IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1238 OF 2003

IN

SUMMARY SUIT NO. 332 OF 2003

Esteem Projects P.Ltd .. Plaintiff

versus

International Thermal Technology

Kirchener Italia Branch S.p.a. .. Defendant

...

Mr.D.V. Dolas i.b Pardiwala & Co for Plaintiff.

Ms.Yasmeen Karanjia i/b Mr.P.P. Surve for Defendant

CORAM : D.G. KARNIK, J

DATED : 24th March 2005.

P.C:-

1. Heard learned counsel for the parties. This motion is taken out by the defendants under section 8 of the Arbitration and Conciliation Act (for short the Act) for referring the parties to arbitration.

2. The defendant placed an order on the plaintifff on

27th February, 1998 for work of materials supply and shop frabrication of steel work and fabrication and erection at site. The plaintiff carried out the work and according to it some money is due and payable from the defendant in respect of the said work carried out. The plaintiff has therefore filed this suit for recovery of the amount due and interest. On service of the writ of summons, the defendant filed an appearance and took out this motion for referring the parties to arbitration under section 8 of the Arbitration Act. The defendant contends that clause 14 of the general terms and conditions of purchase requires that all disputes which are not mutually resolved shall be referred to and settled by an arbitration to be carried out in accordance with the said clause. Hence, it is submitted that the present suit is not maintainable and in any event the parties are required to be referred to arbitraiton under section 8 of the Act. By filing an affidavit in reply on 6th June, 2003 the plaintiff has stated that copy of the order annexed as Exhibit A to the plaint is a complete copy of the contract. He has further stated that the affidavit that copy of the alleged general terms and conditions of purchase was not forwarded to the plaintiff when the order was placed or at any

time. He has further stated that he has never signed a copy of the general terms and conditions and contended in the said alleged general terms of conditions of purchase did not form part of the contract between the parties. No rejoinder has been filed by the defendant denying these averments. Perusal of the copy Exhbit 2 annexed to the affidavit in support of the motion shows that the general terms and conditions do not bear the signature of the plaintiff. There is no material on record produced by the plaintiff to show that the general terms were ever communicated to the plaintiff or ever formed part of the purchase order between the parties. In the circumstances, the defendant has failed to prove that the general terms and conditions of purchase were ever agreed upon between the parties or formed part of the contract. AS such clause 14 in the said general terms of conditions of purchase does not form part of the contract at all between the parties. Hence, motion is dismissed.

D.G.KARNIK, J